



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

taking the words in their literal sense, this definition could include the so-called "non-continuous" easements, whenever the latter were "necessary to the reasonable enjoyment of the premises." Aside from that, however, its principal advantage would appear to be the emphasizing of "continuous" rather than "apparent," thereby avoiding difficulties which occur in connection with the latter.

R. T. B.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURIES ARISING IN THE COURSE OF THE EMPLOYMENT—The various terms which have been used in compensation acts to delimit the precise scope of a workman's employment have proved fruitful sources of litigation. A large number of the cases decided under the English Act seek to define the phrase, "personal injury by accident arising out of or in the course of his employment," almost every word of which has been under repeated fire in the courts. Nor do most of the American statutes seem to have clarified the law on this point.¹

In a very recent case ² a plumber's assistant was found dead on the road near his employer's wagon, with which he had started to work. The head and shoulders of the deceased were covered with cuts and bruises; death had been caused by a hemorrhage of the brain. Upon these facts the Committee of Arbitration found that the deceased had met his death in the course of his employment.³ The decision was affirmed by the Industrial Board,⁴ only to be reversed by the Supreme Court.⁵

¹ *Western Indemnity Co. v. Pillsbury*, 151 P. 398 (Cal. 1915); *Spooner v. Saturday Night Co.*, 153 N. W. 657 (Mich. 1915); *Klavinsky v. Lake Shore and M. S. Ry. Co.*, 152 N. W. 213 (Mich. 1915); *Rongo v. Waddington & Sons*, 87 N. J. L. 395 (1915); *Smith v. Price*, 153 N. Y. S. 221, 168 App. Div. 421 (1915); *Moore v. Lehigh Valley Ry. Co.*, 154 N. Y. S. 620, 169 App. Div. 177 (1915).

² *In re Sanderson's Case*, 113 N. E. 355 (Mass. 1916).

³ "The Committee further found: 'That there was no direct evidence tending to show how or in what manner Sanderson fell from the wagon. There was no positive evidence as to whether the hemorrhage did occur before or after the fall from the wagon, but from the circumstances as disclosed by all the evidence, we find as a fact that Sanderson either fell or was thrown from his wagon while he was in the employ of Black . . . and that the black and blue spots were made by the fall.' . . ." *In re Sanderson's Case*, *supra*.

⁴ "The weight of all the evidence showed that he was thrown by an accident and not by a stroke of apoplexy or other natural causes; and that he was thrown from the wagon by the sudden moving or starting of the horse. . . ." *In re Sanderson's Case*, *supra*.

⁵ "While there was ample evidence from which it could have been found that so far as could be ascertained, the employee was in a normal and healthy condition, without any impairment of his arteries or disease of any

No wording of a statute can resolve the narrow question of fact—or inference based upon a fact, presented in such cases. The principle of *stare decisis* can rarely be invoked, and until a court of last resort has spoken, the result must be doubtful.

An essentially similar problem arose early in the law of agency. In one of the early cases⁶ the decision turned on whether a servant had acted within his authority. The court after discussing the point at length,⁷ finally affirmed by the action of the trial court in holding that in a close case the question was for the jury. The cases upon this point are limitless and there has been resort to many rules to cover the ever-varying concatenation of circumstances.⁸ Many of the modern decisions grapple with the problem, but in a doubtful case⁹ it is usually asserted that the question is for the jury. With this statement the common law started in 1834; therewith it has ended in 1916.

The point to be noted is not that litigation is more difficult in these cases, but that only by litigation and the decision of the highest court, can they be settled at all. The question, when an employee is within the scope of his employment, or when an injury can be said to arise out of the employment, has become one of increasing frequency and importance under the various compensation acts. The purpose of these acts has been judicially expressed:¹⁰

"As an endeavor to provide a way by which employer and employee may, if they so choose, escape entirely from that troublesome and economically absurd luxury, known as 'personal injury litigation,' and resort to a system by which every employee not guilty of wilful misconduct may receive *at once* a reasonable recompense for injuries accidentally received in his employment *under certain fixed rules, without a law suit and without friction.*"¹¹

of the organs of his body, and that it was unusual for a man of his age to suffer a cerebral hemorrhage unaccompanied by some physical injury, still, there seems to have been an entire absence of evidence to show that the hemorrhage was caused by the fall from the wagon. It could have been found that the blow upon the head was sufficiently severe to have caused the hemorrhage, but there is no evidence to show that such injury did produce the hemorrhage. . . ." *In re Sanderson's Case, supra.*

⁶ *M'Kenzie v. M'Leod*, 10 Bing. 385 (Eng. 1834).

⁷ "The question is whether the finding of the jury was correct under the direction of the chief justice that the defendant was not liable unless the injury was occasioned by something done within the scope of the servant's duty. Now the words, 'the servant's duty,' may convey several meanings. They may mean cases where the duty is defined by precise orders; or where something is directed to be done, and the manner of doing it is left wholly in the discretion of the servant, or where the manner of doing it is only partly left in his discretion." Per Alderson, J.

⁸ See Labatt: "Master and Servant" (2d Ed.), Vol. 6, p. 6851 ff.

⁹ Cf. *McDermott v. Griffiths*, 190 Ill. App. 53 (1915).

¹⁰ Chief-Justice Winslow in *Borgnis v. Falk Company*, 147 Wis. 327, 337 (1911).

¹¹ The italics are the writer's.

If such be the purpose of the act the large number of cases which are indeterminable until passed upon by the highest court, constitute a serious menace to its successful operation.

The effect of most of the acts¹² as exemplified by the Sander-son case has been merely to substitute the conjecture of a commis-sion for the conjecture of a jury, leaving the result conjectural until passed on by the Supreme Court. The Pennsylvania Act of 1915 has sought to avoid the notorious vagueness¹³ of its predecessors, notably the English Act, by extended definition.¹⁴ The result seems to have justified the expectations of its framers. While a number of litigable questions have arisen, which are not expressly covered by the act and must be decided in each particular case by an accel-erated common-law procedure,¹⁵ the problem of exactly what in-juries merit compensation seems to be met in almost every instance by the express provisions of the statute.¹⁶ Such questions were raised in nearly one-half of the cases that arose under the act during the last ten months, exclusive of those settled by agreement between the parties. In most of these every doubt was resolved by reference to the words of the act.¹⁷ But though the act has gone far, too far it is submitted,¹⁸ in order to reduce to certainty the injuries which fall within its beneficial provisions, there still remains a number of cases, not inconsiderable, whose speedy adjustment seems hope-less.¹⁹ In these the act has provided a more summary procedure,²⁰ but the human equation which makes such a case doubtful until passed on by the Supreme Court, still remains. To that extent the uncertainties and delays of the old system still exist.

¹² The Acts of California and Wisconsin provide for the compensation of all injuries growing out of the employment, unless the injury was the result of the wilful misconduct of the injured employee. In most cases an employee has a right of appeal from an adverse ruling of the adminis-trative board to the highest court.

¹³ See article by Francis H. Bohlen, entitled, "A Problem in the Drafting of Workmen's Compensation Acts," 25 Harvard Law Review, 328-348 and 401-427.

¹⁴ Art. 3, Sec. 301, P. L. 738 (1915).

¹⁵ See *Stanley v. Wetherill*, 2 Dep. Rep. 2153 (1916); *Proper v. Union Ice Co.*, 2 Dep. Rep. 1100 (1916).

¹⁶ Cf. the definition of "contractor" in Sec. 105.

¹⁷ Cf. *Ward v. Thompson*, 2 Dep. Rep. 507; *Maufler v. Brenner*, 2 Dep. Rep. 1234.

¹⁸ *Tomazezki v. Carnegie Steel Co.*, 2 Dep. Rep. 2176, where compensa-tion was awarded to dependents of an employee killed by lightning, apart from whether his employment contributed in any way toward the accident.

¹⁹ *Murray v. Cunningham and Murray*, 2 Dep. Rep. 2043; *Kruth v. Metro-politan Life Ins. Co.*, 2 Dep. Rep. 2045. Cf. *Roller v. Drueding Bros.*, 2 Dep. Rep. 1236; *Sawiskey v. Foederer*, 2 Dep. Rep. 835, and *Beaton v. Hess Mfg. Co.*, 2 Dep. Rep. 845.

²⁰ Cf. the power of the Compensation Board to dispense with the usual rules of evidence, to enlist the services of a physician, *etc.*

Administrative efficiency has been the goal of the framers of the act.²¹ To secure it the common-law defenses of "contributory negligence," "assumption of risk," and "the fellow-servant rule" were discarded. Economic consistency was cast aside. The economic theory underlying the Pennsylvania Act seems to have been expressed by the Wisconsin Court:²² "Personal injury losses incident to industrial pursuits, as certainly as wages, are part of the cost of production of those things essential to or proper for business consumption, and the more directly they are incorporated therein, the less the enhancement of the cost and the better for all."²³

If such is the economic basis of the act, and it is submitted that only upon such basis can the various features of the act be reconciled, economic consistency was sacrificed in the quest for administrative efficiency by a provision refusing compensation for occupational diseases.²⁴ Yet because compensation is restricted to "injuries," and only to such "injuries" as are in a sense due to the employment, a large number of cases inherently litigable, and covered by no fixed rule of law, still remain to hinder the rapid adjustment of claims under the act.

Only by extending the Workmen's Compensation Act to cover all injuries, in fine, by making it an Industrial Insurance Act, can such cases be avoided.²⁵ Nor would such a far-reaching legal and economic measure obviate every perplexing question of fact and opinion. *Mala fide* claims for compensation, based upon pretended injuries, would loom large to vex the administrator.²⁶

It would seem therefore, that where a claim rests upon a disputed question of fact, litigation can be avoided only by entrusting

²¹ See address of Francis H. Bohlen before the Law Association of Philadelphia, November 15, 1912, p. 15 ff., printed by the Law Association of Philadelphia.

²² *Borgnis v. Falk Co.*, *supra*, note 10.

²³ See also, Frankel and Dawson, "Workmen's Insurance In Europe," p. 9; Henderson, "Industrial Insurance," p. 18, quoted by Boyd in "Workmen's Compensation," p. 43.

²⁴ Art. 3, Sec. 301, *supra*, note 14.

²⁵ The economic basis of such a measure is obvious. Several of the text writers have given as the basis of the Compensation Acts, an economic theory which pertains to industrial and old age insurance. "The object of giving an injured workman a cause of action for injuries is not only to compensate the workman, especially in the case of death or total disability, but principally to furnish some compensation to his dependents who might become public charges when their means of support are cut off by such an accident." "Workmen's Compensation," James H. Boyd, p. 58. On p. 59 it is stated: "The effect on the dependents is just the same whether the cause of the injury was due to the negligence of the employee, to that of the employer, or to the natural hazards of the business." Or, it may be added, whether the employee dies of typhoid fever. See also "State Insurance," A. F. Lewis, p. 7, for the sociological and economic argument for such a measure.

²⁶ *Proper v. Union Ice Co.*, *supra*, note 15.

the ultimate decision of the point to an administrative officer. Such seems to be the trend under the Pennsylvania Act. The decision of a referee is accorded the weight of the verdict of a jury, and will be reversed by the Compensation Board only when manifest error has been made.²⁷

B. W.

²⁷ Cf. *Desarno v. Del. and Lackawanna R. R.*, 2 Dep. Rep. 510, affirmed in 2 Dep. Rep. 1272; *Calderwood v. Altoona*, 2 Dep. Rep. 748, affirmed in 2 Dep. Rep. 1274; *Agney v. Ginsburg*, 2 Dep. Rep. 595, affirmed in 2 Dep. Rep. 848.